

BEFORE THE STATE BOARD OF EDUCATION  
STATE OF NEBRASKA

Forrest	)	
	)	
	)	
On Behalf of Their Minor Child	)	
Mariah	)	
	)	NDE Case No. 10-13
Petitioners	)	
	)	
v.	)	
	)	FINAL ORDER
Emerson-Hubbard Community Schools	)	
P O Box 9	)	
Emerson, NE 68733	)	
	)	
Respondent.	)	

Petitioners filed this appeal pursuant to Neb. Rev. Stat. §79-232, et. seq. (Reissue 2008) and Title 92, Nebraska Administrative Code, Chapter 61. Petitioners request that the State Board of Education reverse the Respondent School District's decision to reject the Petitioners' request for release approval for their late filed option enrollment application to enroll Mariah in the Allen Consolidated School District for the 2010-2011 school year.

The hearing on this matter was consolidated with the hearing in Case No. 10-13, also filed by Petitioners, and was convened, pursuant to Notice, at 10:07 a.m. on September 3, 2010, before John M. Boehm, Hearing Officer, appointed by the State Board of Education, in the State Board Room, Nebraska Department of Education, Sixth floor, State Office building, 301 Centennial Mall South, Lincoln Nebraska. Petitioners were represented by Kyle C. Dahl, Attorney at Law, P O Box 427, Wayne, NE 68787. The Respondent was represented by Kelley Baker, Attorney at Law, P O Box 82028, Lincoln, NE 68501-2028. The hearing was recorded by General Reporting Service of Lincoln, Nebraska.

The Nebraska State Board of Education, having considered the Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation, and having been fully advised in the matter, finds that it should adopt and incorporate by reference in this Order as its Findings of

Fact and Conclusions of Law, the Hearing Officer's Findings of Fact and Conclusions of Law and should follow the Hearing Officer's Recommendation.

WHEREFORE, the Nebraska State Board of Education finds, decrees, orders and adjudges:

1. The State Board of Education adopts the Hearing Officer's Findings of Fact and Conclusions of Law in all respects and incorporates them by reference in this Order to the same extent and like effect as if such Findings of Fact and Conclusions of Law were fully set forth verbatim herein.
2. That the Respondent School District's decision to reject the Petitioners' request for release approval for their late filed option enrollment application to enroll Mariah Allen Consolidated School District for the 2010-2011 school year is overturned, their request is granted and their application is approved.

Dated this 7<sup>th</sup> day of January, 2011.

STATE BOARD OF EDUCATION

BY:   
Jim Scheer, Board President

The vote by the State Board of Education to approve the Final Order in Case No. 10-13, on January 7, 2011, was 8 in favor, \_\_\_\_\_ against, \_\_\_\_\_ abstaining, and \_\_\_\_\_ absent. Individual State Board Members voted as follows:

IN FAVOR: J. SCHEER, R. EVNEN, M. QUANDAH, R. VALDEZ, P. TIMM, L. CRONK,  
M. O'HOLLERAN, J. SIELER

AGAINST: \_\_\_\_\_  
\_\_\_\_\_

ABSTAINING: \_\_\_\_\_

ABSENT: \_\_\_\_\_

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Final Order was served by First Class United States Mail, postage prepaid, on this 7<sup>th</sup> day of January, 2011, to the following parties:

Forrest and Mona

Kyle H. Dahl  
P.O. Box 427  
Wayne, NE 68787

Kelley Baker  
Attorney at Law  
P.O. Box 82028

Brenda L. Wid

BEFORE THE STATE BOARD OF EDUCATION  
STATE OF NEBRASKA

Forrest	Mona	)	NDE Case No. 10-13
		)	
		)	
On Behalf of Their Minor Child		)	
Mariah		)	
		)	
	Petitioners	)	
		)	
v.		)	
		)	
Emerson-Hubbard Community Schools		)	
P O Box 9		)	
Emerson, NE 68733		)	
		)	
	Respondent.	)	

Forrest	and Mona	)	NDE Case No. 10-14
		)	
		)	
On Behalf of Their Minor Child		)	
Kenneth		)	
		)	
	Petitioners	)	
		)	
v.		)	
		)	
Emerson-Hubbard Community Schools		)	
P O Box 9		)	
Emerson, NE 68733		)	
		)	
	Respondent.	)	

HEARING OFFICER'S PROPOSED  
FINDINGS OF FACT, PROPOSED  
CONCLUSIONS OF LAW AND  
RECOMMENDATION

INTRODUCTION

Petitioners have filed two appeals pursuant to Neb. Rev. Stat. § 79-232, et seq. (Reissue 2008) and Title 92, Nebraska Administrative Code, Chapter 61. Petitioners request that the State Board of Education reverse the Respondent School District's decisions not to release approval for the late filed option enrollment applications filed by Petitioners to enroll Kenneth and

Mariah            in the Allen Consolidated School District for the 2010/2011 school year. These two appeals were consolidated for purposes of hearing by the Hearing Officer at the hearing without objection. After reviewing the transcript, the Hearing Officer further finds that the two appeals may also be consolidated for purposes of this Proposed Findings of Fact, Proposed Conclusions of Law and Recommendation to the Board.

The hearing in this matter was convened pursuant to Notice, at 10:07 a.m. on September 3, 2010, before John M. Boehm, Hearing Officer, appointed by the State Board of Education, in the State Board Room, Nebraska Department of Education, Sixth Floor, State Office Building, 301 Centennial Mall South, Lincoln, Nebraska. Petitioners were represented by Kyle C. Dahl, Attorney at Law, P O Box 427, Wayne, NE 68787. The Respondent was represented by Kelley Baker, Attorney at Law, P O Box 82028, Lincoln, NE 68501-2028. The hearing was recorded by General Reporting Service of Lincoln, Nebraska. The hearing was conducted pursuant to the Department of Education's Rules of Practice and Procedure for Hearings in Contested Cases before the Department of Education, Title 92, Nebraska Administrative Code, Chapter 61. The formal rules of evidence applicable in District Court were timely requested by the Respondent and were applied to the hearing. Mona            testified on behalf of the Petitioners. In addition, Thomas Baker, Superintendent at Emerson-Hubbard Schools was called as a witness by Petitioners. James Northwick, the Elementary Principal, testified on behalf of the Respondent. The parties jointly offered 18 exhibits at the commencement of the hearing which were received into evidence without objection. These exhibits are as follows: (1) Petition in Case No. 10-13; (2) Petition in Case No. 10-14; (3) Answer in Case No. 10-13; (4) Answer in Case No. 10-14; (5) Title 92 Nebraska Administrative Code Chapter 61; (6) Title 92 Nebraska Administrative Code Chapter 19; (7) Answers to Interrogatories; (8) Application for Option Enrollment for Kenneth

(9) Application for Option Enrollment for Mariah ; (10) Letter from Emerson-Hubbard Schools dated 5/11/2010; (11) Letter from Michael Pattee, Principal, Allen Consolidated Schools dated 8/31/2010; (12) Power School report card for Kenneth dated 6/21/2010; (13) Emerson-Hubbard Community School - Student Handbook 2009/2010; (14) Emerson-Hubbard Community School Policy Number 5006, Option Enrollment Policy; (15) Emerson-Hubbard Community School Policy Number 5415, Anti-Bullying Policy; (16) E-mail from James Northwick, dated 4/22/2010; (17) E-mails from Sheri Eaton, dated 4/1/2010 and 4/5/2010; and (18) Emerson-Hubbard Community School Policy Number 5101, Students.

The Petitioners offered Exhibit 19, a letter from Jeffrey Munderloh, PA, dated 4/27/2010 which was objected to by the counsel for the Respondent. The objection to the non-medical opinion expressed by the writer of the letter was sustained. The Exhibit was accepted for the limited purpose of the medical statements by the author of the letter. Petitioners also offered Exhibit 20, an e-mail from Monica and Forrest . to Sheri Eaton dated 4/6/2010. There was no objection and it was received into evidence.

A transcript of the hearing, including all testimony and exhibits, is attached hereto. The parties' requests to submit post-hearing briefs were granted and the parties were given until September 13 for submission of briefs. Copies of said briefs are also attached.

#### PROPOSED FINDINGS OF FACT

1. Forrest and Mona are married. She has been a social worker with the Nebraska Department of Health and Human Services for 20 years. She is currently residing with their two children, Kenneth and Mariah, at , Nebraska. This is a rental property. Prior to that, all four members of the family were living at , in Waterbury, Nebraska. Her husband still resides at that address.

2. Kenneth is 12 years old and now in 7<sup>th</sup> grade. Mariah is 13 years old and now in 8<sup>th</sup> grade. They are currently attending school at the Allen Consolidated Schools where they began their first year at that school district in August, 2010. Prior to that, they attended Emerson-Hubbard Community Schools in Emerson. Mariah was in the middle of kindergarten when they first moved to Emerson. Kenneth began his kindergarten year in Emerson, Nebraska.

3. His mother describes Kenneth as an easy going child who makes friends easily and has a good sense of humor. He has a birth defect, a submucous cleft palate and bifid uvula, and a learning disability associated with those conditions. He has deficits in reading. Kenneth has an individual educational plan developed with the Emerson Public Schools. He has received additional one on one assistance in the resource room as a result of his reading deficit.

4. Mrs. describes the relationship between Kenneth and her daughter Mariah as close and very protective of each other. Of the two, Mariah is more of a scholar and is an A/B student. Kenneth has to work much harder at his grades because of his reading deficit and has a difficult time. There is no history of behavioral problems at school with Kenneth.

5. During his last year at Emerson, Kenneth was in sixth grade in a class of 22 students, 12 of them boys.

6. Mrs. and the two children moved into the Allen School District to attend school when their option enrollment petitions were denied, because she understood that the hearings would not be completed until after school started. Kenneth's therapist also advised them to make this move. The decision was made by the to file the option enrollment petition on behalf of Kenneth because of "bullying" problems that Kenneth was subjected to, and their belief that the situation was not going to improve.

7. In January and February of 2010, the parents started seeing different behaviors exhibited by Kenneth including teeth grinding, stomach aches, and chewing his fingernails to the point where they would bleed. He was also expressing anxiety about going to school. They had previously been to the doctor about his stomach pains with no real answer. They were unable to make any headway until April 5, 2010, when Kenneth confided in them about his problems. Kenneth told them that another boy in his class, referred to as Student B, had hit him several times in the groin and the arm and had called him names such as retard, sped boy, and faggot. When Kenneth had a friend over to spend the night, B had called them both butt-f-ing buddies. B also told Kenneth in a very vulgar way that he wanted “to do” his mommy. Kenneth said these things had been going on most of the year on an on and off basis but had become worse after the family returned from vacation in March. On Sunday nights he would chew his fingernails to the point where they would bleed. He wasn’t sleeping and the dentist pointed out to them that he was grinding his teeth. They had also sought medical treatment for his stomach aches and other signs of anxiety.

8. Mrs. Eaton, Kenneth’s teacher, wrote his parents by e-mail on April 1, 2010, concerning low grades and failure to complete homework.

9. On April 6, 2010, the parents e-mailed Mrs. Eaton back, wherein they stated that they had just learned that Student B and Student M were saying things about Kenneth and embarrassing him. B even hit him the day before. They told Kenneth to stay away from him. The parents did not address the academic issues originally raised by Mrs. Eaton. Mrs. Eaton requested more information.

10. Mrs. Eaton told Principal Northwick that the two students were making inappropriate remarks to Kenneth. She also told Kenneth and his parents that Kenneth should



stay away from the students involved to avoid such behavior. On April 13<sup>th</sup>, Mrs. Eaton e-mailed the inform them that Kenneth was not staying away from Student B and was in fact standing near him in various lines and at lunch.

11. The took Kenneth to see Jeffrey Munderloh, Physician's Assistant, on April 12, 2010, and also Dr. Quinn Kneif in April, both at Mercy Medical.

12. On April 15, Principal Northwick rode the sixth grade bus to high school to monitor the ride and told the students not to engage in inappropriate behavior. On April 21, Principal Northwick talked to some students, not including Kenneth, who were calling each other names, and also a group, which did include Kenneth, who were pushing each other in PE class.

13. On April 21, 2010, Principal Northwick received an e-mail from the informing him that the problems with Student B and Kenneth had not gotten any better and that Kenneth didn't want to go to school.

14. On April 22<sup>nd</sup> Principal Northwick met with Kenneth to discuss the continuing problems and also to remind Kenneth not to be one of the students that was involved in the inappropriate behavior. Kenneth needed to let teachers or Mr. Northwick know about any problems when they happened.

15. On April 23, 2010, Mr. and Mrs. met with Mrs. Eaton, the 6<sup>th</sup> grade teacher, and Mr. Northwick the principal of the elementary school at the school. The parents wanted to know what was going on and what things were being done to address the bullying in the future. In the Petitioners' meeting with Mr. Northwick on the 23<sup>rd</sup> of April, they did discuss the option enrollment program. Mr. Northwick indicated that he would have applications in the mail to them, which he did.

16. After the meeting, Kenneth reported to his parents that B continued in his bullying activities. For example, B would sit on the bus and yell out profanity to the other kids that were sitting near him trying to avoid being caught on the camera. Mrs. said she personally witnessed B carrying out these types of behaviors. After the meeting on April 23<sup>rd</sup>, Kenneth's symptoms continued to get worse and he stated that people weren't listening to him and were ignoring his concerns.

17. At this point in time, his sister Mariah was in 7<sup>th</sup> grade in the high school building and not at the elementary school. She was no longer there to defend her brother.

18. After meeting with Physician Assistant Jeffrey Munderloh on the 12<sup>th</sup> of April, the Petitioners determined regardless of what the school was attempting to do, that it would not be a safe environment for Kenneth. They were also afraid that Mariah would be subject to retaliation from the community in general, so they decided to have both children moved from the school district.

19. The had asked for an option enrollment application and for Emerson-Hubbard's rules in regard to opting out. The school district they would be opting into was Allen which was six miles from their home, whereas Emerson, which was the district in which they resided, was actually 12 miles from their house. They were aware of this fact when they originally bought their home in the Emerson School District.

20. The filed an application for each child on April 27, 2010. They were aware that this was beyond the March 15 deadline. In support of their application for Kenneth, they submitted a letter from PA Munderloh dated April 27, 2010, in regard to Kenneth's health.

21. After filing the applications for option enrollment on April 27<sup>th</sup>, the received a telephone call from Mr. Northwick on May 5 stating that there were continuing issues

with Kenneth and student B. Mr. Northwick said he heard some words between the two boys. Likewise, on May 6, Kenneth reported to his parents that B said he was going to mess him up.

22. On May 10, 2010, the Petitioners attended the school board meeting in regard to the applications for student transfers. They were told they had missed the filing deadline and that their concerns of bullying had been addressed.

23. On Friday, May 14, 2010, Kenneth came home from school and said that B had threatened to beat him up the following Monday and that he was going to break another classmates collar bone. This upset Kenneth as the other classmate referenced in the threat, had a fight in August of 2009 with Student B where that same child was hospitalized with a broken collar bone. The                      consulted with the County Attorney and also called the local police. Mrs.                      contacted Mr. Northwick on the 17<sup>th</sup> of May, 2010, because she was concerned that the steps in the school bullying policy were not being followed.

24. Toward the end of the school year, on May 20, 2010, Kenneth would come home every day relating different things that student B had said or done. His parents advised Kenneth to stay away from him, even though it was difficult in a class of 22 students.

25. Based on Kenneth's grades on his report cards, his school work had deteriorated from April 5 through the end of the school year. During this time frame, the                      met with Mrs. Brownell, Kenneth's resource teacher whom he had worked with since kindergarten, and also with Billie Hightree, covering their concerns. Ms. Hightree, the school psychologist, also met with Kenneth and did see a change in his personality.

26. The Hearing Officer in response to an objection against Exhibit 19 stated that he would disregard the physician assistant's opinion contained in said letter as to educational matters, as there was no evidence to show that PA Munderloch had experience in that field.

Nevertheless, the letter does show that he had seen Kenneth as a patient for seven years and that he was suffering from significant abdominal pain which can be psychosomatic pain from stress. It is also worth noting, that the letter was already part of an exhibit that was introduced by stipulation, that being Exhibit 2, the Petition filed with the State Board for Kenneth. The Petitioners also sought the services of a psychologist, Dr. Twila Prescott in South Sioux City for counseling for Kenneth. This started on June 3, 2010. She diagnosed Kenneth with anxiety disorder. Kenneth is presently taking an anti-depressant, Zoloft, and a stomach medication, Bentyl, for stomach problems that may be the beginning of an ulcer.

27. On June 10, the Petitioners had received a letter from the Nebraska Department of Education regarding their appeal hearing. The following night there was vandalism on their property resulting in a smashed mailbox. That set off Kenneth, and they sought the assistance of PA Munderloh who advised him getting into therapy.

28. At the present time, according to Mrs. Kenneth is doing extremely well at Allen, both his physical and psychological symptoms have improved for the better. Michael Pattee, Principal at Allen Consolidated Schools, wrote a letter on August 31, 2010, saying that the children had adapted well at the new school.

29. Mrs. further acknowledged that Mr. Northwick told them that Kenneth was approaching student B to interact with him. Mrs. acknowledged that was as a result of parental advice to try to befriend him. They were aware that Kenneth was playing football and basketball with student B and other classmates. They were aware that school officials had advised Kenneth to avoid student B and not to interact with him, but that would have excluded Kenneth from interacting with other classmates as well.

30. The Petitioners desire to have Mariah transferred to Allen Consolidated Schools is primarily to have her in the same district as her brother. Mrs. . . . however, also stated that they didn't want to leave her in an environment in Emerson where she could be the subject of retaliation from the community. In this regard, Mrs. . . . related an incident involving Mariah that occurred three of four years ago regarding a complaint of abuse about a daycare provider.

31. Thomas Becker is the Superintendent at Emerson Community Schools. He has served in that capacity for eight years and he is familiar with Kenneth and Mariah . . . He has 33 years of classroom and administrative experience. The local school board makes the decisions on option enrollment applications out of the district. The process is automatic for applications submitted before March 15, but on applications filed after that date the Board of Education reviews the application under the terms of their policy to determine if it meets any of the requirements for a release for an option out. Local school boards are required by law to have a board policy in place regarding option enrollment policies. If the board's policy is not met on a late option out application the board will deny the application.

32. There are six conditions in the Emerson School District policy regarding reasons for approval of a late option out application. One has to do with kindergarten enrollments and one has to do with having a sibling enrolled in another district. Neither of these criteria would have been applicable to Kenneth for the 2010/2011 school year. As to the third criteria, Kenneth did not have any needs that were not being met or could not be met by the Emerson School District in terms of his IEP or other educational services and he did not meet that criteria. As to the fourth criteria, to prevent a drop out, it was the Board's decision that Kenneth was not a drop out risk and thus it was not applicable. The fifth condition is whether the student has presented

any unique conditions as to the student that makes continued attendance in the district harmful to the student. The Superintendent did not see that the bullying behavior complained of fell within this category of presenting any unique harmful conditions particularly as the student would move on to the seventh grade. The sixth criteria involves a pending expulsion, was also not applicable here.

33. The Emerson School District has also implemented specific policies relating to bullying as required by state law.

34. The parents did not initially report to Mrs. Eaton or the Superintendent that student B had ever hit Kenneth either in the groin or the arm. Mrs. . said that Kenneth had told her that the hit to Kenneth mentioned in her April 6, 2010, e-mail to Mrs. Eaton, was in the stomach, but that she had not previously discussed Student B hitting Kenneth in the past until they met on April 23, 2010. Kenneth had not initially confided in his parents about the physical contact which had happened earlier in the school year.

35. Mr. Becker explained the school's philosophy dealing with inappropriate behavior at the 5<sup>th</sup> and 6<sup>th</sup> grade level as one of trying to educate them as to what constitutes appropriate behavior and that there will be consequences for inappropriate behavior. Student in this age range are undergoing a lot of changes in their lives and the school wants to teach them the correct responses to situations that will arise. The emphasis is on learning from that experience rather than penalizing the student to a greater extent in the beginning. It is a difficult time for students in that age range emotionally, socially, and physically and they often do not know how to deal with these changes. The school tries to help them understand these changes and the fact that decisions that they make affect both themselves and other people.

36. The Superintendent acknowledges that Student B's behavior toward Kenneth was inappropriate but that it would not automatically constitute bullying. Making verbal statements does not automatically constitute a bullying situation according to Mr. Becker.

37. James Northwick is the elementary principal at Emerson-Hubbard Schools. This is his second year in that capacity. He taught for 3 ½ years prior to becoming a principal. While he is responsible for maintaining discipline and the safety of children, he prefers to view his position as one of teaching what is right and wrong. He describes Ms. Eaton as a very experienced teacher with over 25 years of experience. Mr. Northwick wants to insure that students focus on education and learning and he tries to keep out inappropriate behavior such as name calling and the like. He states that use of inappropriate words and name calling is not uncommon at the 6<sup>th</sup> grade level. In a situation involving name calling, he will bring the offending student into his office and talk about it and also talk to the teacher in that particular classroom before he would turn to the bullying and harassment policy.

38. Ms. Eaton was not aware of the situation involving these two boys until it was brought to her attention on April 6. Initially she advised Kenneth to stay away from Student B. She tried to separate them during lunch and when washing hands in the classroom. She then observed Kenneth standing next to Student B in the lunchroom and concluded that the two students were no longer having any more problems if Kenneth was standing close to Student B.

39. The 6<sup>th</sup> grade students take a bus from the elementary to the high school for P.E. and music classes. There had been some general problems on the bus in terms of name calling and misconduct but it was not related to Student B. The school put a camera on the bus and Mr. Northwick rode the bus on several occasions.

40. There were also some problems in P.E. class involving Student B and Student S and some pushing and shoving. Mr. Northwick talked to both of the students about the issue.

41. Mr. Northwick received an e-mail on April 21 from the Petitioners stating that the problem between Kenneth and Student B was not getting better. Mr. Northwick also talked with Kenneth on about the 21<sup>st</sup> or 22<sup>nd</sup> of April. He told Kenneth that some of the name calling in this particular age group simply needs to be ignored.

42. Mr. Northwick met with the entire 6<sup>th</sup> grade on April 22 and talked about the behaviors on the bus and in general name calling and picking on one another. He told them that the behavior needed to stop and if there was a continuation of any kind of name calling or negative behavior towards each other the students would be separated. He previously advised Ms. Eaton of this fact and also informed the para-educators to enforce this policy at recess. In addition to being split up, the involved students would be placed against the wall at recess. This was the same time the camera was placed on the bus and if there wasn't a camera, one of the teachers or himself was to ride the bus. He also informed the students that some privileges could be taken away such as the 6<sup>th</sup> grade track and field day or the class picnic. He, along with Ms. Eaton, constantly tried to keep Kenneth away from Student B.

43. Up until his parents complained on or about April 6, Mr. Northwick had observed Kenneth to be having a good year. When he met him in the hallway he always seemed positive and outgoing. After the complaint he made it a point to check in with Kenneth to see how he was doing. On the 28<sup>th</sup> of April he asked Kenneth how things were going and Kenneth told him they were a lot better. On April 29<sup>th</sup>, he had an occasion to observe the 6<sup>th</sup> graders at recess and in particular observed Kenneth and Student B and another student playing football. There was some physical contact and the students fell down on the ground even though it was touch.



football. He asked them both after recess if there were any problems at recess and they both said no, it was just an accident. Both students appeared happy and smiling. He also observed Kenneth and Student B playing at the same basketball hoop even though two hoops were available for the 6<sup>th</sup> grade. On May 4 he again spoke with Kenneth and asked him how things were going. Kenneth said it was going a lot better, but he did have a question about a comment made by Student B in the library class. Mr. Northwick talked to Student B and said that the comment was not directed towards Kenneth.

44. On the following day, May 5, Mr. Northwick called Mrs. regarding his recent contacts with him and that things seemed to be going well with Kenneth. He wanted to make sure that the were getting the same reports at home that he was receiving at school. Mrs. said she was still getting some remarks that Student B was making on the side.

45. Mr. Northwick continued to remind the students that you shouldn't put yourself in a position where you are alone with another student as it puts both of you in a bad position. During the period from April 6 to May 5, Kenneth would seek out Student B at recess and also they would be in close contact during P.E. classes, and from Mr. Northwick's observations it appeared that things had gotten better between the two students.

46. In regard to the allegation that Student B had threatened another student, Student B admitted to Mr. Northwick that he had said something and that it was not directed at Kenneth but at a third student. Student B was then placed on Level I of the bullying policy. When he previously met with the 6<sup>th</sup> grade students he had also advised them that under the disciplinary policy step one is a verbal warning. If there was another incident the student would be placed in the second step of the disciplinary policy. Because the incident happened at lunch, he took away

Student B's lunch and lunch recess and the student had to eat in his office and remain there for recess for a period of five days. Mr. Northwick talked to as many students as possible to verify that what Student B had told him was correct. All of the other students' statements reinforced Student B's statement.

47. Mr. Northwick continued to observe Kenneth and his relationship with Student B, and observed Kenneth walking up to Student B and talking to him. On one day he observed him approach Student B at least four times to talk about an incident.

48. Mr. Northwick also stated that the Petitioners had never told him that Student B had punched Kenneth at any time. Mr. Northwick was unaware of any physical violence between the two.

49. Mr. Northwick talked to the school psychologist regarding Kenneth, and she stated that he seemed like a happy average 6<sup>th</sup> grade student.

50. Mr. Northwick did not believe that Kenneth faced any unique conditions at Emerson-Hubbard that would be harmful to him as a 7<sup>th</sup> grade student. He did not believe that the name calling incidents constituted a serious harmful condition in his opinion. He likewise stated that he would not immediately call this type of situation harassment or bullying and that he would try and use it as a teaching experience as to appropriate and inappropriate behavior. If the behavior continued then he would look toward the school's policies. He did not feel that the situation experienced by Kenneth in the 6<sup>th</sup> grade would necessarily mean things would be more difficult for him in 7<sup>th</sup> or 8<sup>th</sup> grade.

51. The option enrollment applications for Kenneth and Mariah \_\_\_\_\_ were denied by the Board of Education of Emerson-Hubbard School District on May 11, 2010 with the cited reason: "Does not meet conditions for approval set by board policy."

52. Kenneth's grades in social studies appeared to have declined during the last two quarters of school. Likewise, his spelling and science/health grades went down during the final quarter of the year. Otherwise his grades remained relatively the same throughout the year.

#### PROPOSED CONCLUSIONS OF LAW

1. Neb. Rev. Stat. § 79-232 (Reissue 2002) provides as follows: "The Legislature finds and declares that parents and legal guardians have the primary responsibility of insuring that their children receive the best education possible. In recognition of this responsibility, the Legislature intends to provide educational options for parents and legal guardians. . . ."

2. Neb. Rev. Stat. § 79-237 (2009 Supp.) provides that an option application shall be submitted to the school board of the option district between September 1 and March 15. Applications submitted after March 15 shall contain a release from the resident school district on the application form described and furnished by the State Department of Education. A school district may not accept or approve any application submitted after such date without a release. In the case of an application submitted after the March 15 deadline, the option school district shall provide the resident school district with the name of the applicant within 60 days after submission.

3. Neb. Rev. Stat. § 79-238(2) provides that the school board of every school district shall adopt standards and conditions for acceptance or rejection of a request for release of a resident student submitting an application to an option school district after March 15.

4. Neb. Rev. Stat. § 79-239 (Reissue 2009) provides that if an application is rejected by the option school district or the resident school district rejects a request for release for an application submitted after March 15, the rejecting district shall provide written notification to the parents stating their reason for the rejection and the process for appeal of the rejection to the

State Board of Education. The parent may appeal said rejection to the State Board by filing a written request together with a copy of the rejection notice with the State Board of Education. Such request and a copy of the notice must be received by the Board within 30 days after the date the notification of the rejection was received by the parent. A hearing under this section shall be held in accordance with the Administrative Procedures Act and shall determine whether the procedures of §§ 79-234 to 79-241 have been followed.

5. Petitioners perfected their appeal to the State Board in a timely fashion and pursuant to Neb. Rev. Stat. § 79-239 (Reissue 2008). The State Board of Education has jurisdiction over this matter and the parties thereto.

6. The applications were filed after March 15 of 2010 and the applicable statutes referenced above apply.

7. The Respondent School District has adopted a policy through its Board of Education outlining the criteria it will consider in granting a release for the submission of a late option enrollment application.

8. There is only one of these release requirements which may be applicable to the option enrollment application of Kenneth . That is No. 5, “Unique Harmful Conditions.” Mariah application is based on reason 2, “Siblings”, in which a sibling may be allowed to attend the same school as a sibling student. If Kenneth’s application is not granted under the provision for relief, then there is no basis for Mariah’s application either. Both applications were rejected for not meeting conditions for approval of said Board policy.

9. Petitioners’ basis for appeal, is that their son Kenneth was the subject of “bullying” and that this bullying, despite the action taken by the school constituted “unique harmful conditions”. “Unique harmful condition” is defined in the Emerson-Hubbard School

Board Policy as follows, “conditions unique to the student that make the student’s continued attendance in the District harmful to the student. This exception is intended to be applicable in limited circumstances, . . .” It goes on to describe an example of such circumstances as a sexual assault committed on a student by another student.

10. The Emerson-Hubbard School District has adopted a bullying policy as required by law. The ultimate question to be decided here is really not whether the School District followed its bullying policy or correctly applied its provisions to the situation involving Kenneth and another student, but whether Kenneth was subject to conditions unique to Kenneth that made his continued attendance in the district harmful to him.

11. The State Board of Education has consistently held in appeals under the option enrollment provision, that in order for the Petitioners to prevail, they have the burden to prove by a preponderance of the evidence that the respondent failed to follow procedures of the Nebraska Option Enrollment Program in denying their application.

12. Where an action of a public body is within the scope of authority, such body has the presumption that its action is valid and reasonable. The one who raises the question has the burden of proving facts showing the invalidity of such act. 73 CJS, Public Administrative Law and Procures, § 93(c) at 607-10. See also Hansen v. City of Norfolk, 201 Neb. 532, 267 N.W.2d 537, 541 (1978) and 56 Am.Jur. 2d Municipal Corporations, § 33 at 42. These rules are applicable to school board resolutions. Richardson v. Brahm, 125 Neb. 142, 145, 249 N.W. 557 (1933);

“To overturn a city ordinance on the grounds that it is unreasonable and arbitrary. . . . , the evidence and such facts must be clear and satisfactory. A

regulation by a school board is analogous to an ordinance and is tested by the same general principles.

If a school board acts within the power conferred upon it by the legislature, courts cannot question the manner in which the board has exercised its discretion in regard to subject matter over which it has jurisdiction unless such action is so unreasonable and arbitrary as to amount to an abuse of discretion reposed in it.”

Kolesnick v. Omaha Public School District, 251 Neb. 575, 558 N.W.2d 807 (1997).

See also Robinson v. School District #17 of Lancaster County, 252 Neb. 103, 113, 560 N.W.2d 469 (1997). Likewise, an arbitrary action is one which is taken “in disregard to the facts and circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.” Kolesnick, *supra*, at 583.

13. The changes in the option enrollment statutes, particularly those enacted during the 2009 Legislative session, render reliance in this case upon the Palensky v. Prague Public Schools decision from 1992 before the State Board of Education highly questionable. Certainly, a showing by the School District that it would suffer undue hardship is not an applicable standard to be applied under the current statutory scheme. The issues essentially are whether or not the open enrollment statutes were followed by the School District and whether its actions in applying those statutes were reasonable and not arbitrary or capricious. Likewise, the issue in this case is not whether the School District correctly interpreted and applied its bullying policy in the present case.

14. The Emerson-Hubbard School District does have a policy as required by law for late filed applications for option enrollment. Did the Board correctly apply that policy to the

circumstances? The current statutes do not give any actual guidance to school districts as to what should be contained in policies for granting a release of a late filed option enrollment application. Nonetheless, the criteria adopted by the resident school district, Emerson-Hubbard, seemed reasonable and are not on their face challenged by the Petitioners. Rather, the matter comes down to the application of a particular criteria, which is here the existence of any “unique harmful conditions” which consist of conditions unique to the student that make the student’s continued attendance in the district harmful to the student.

15. Although not a required finding, the facts surrounding the situation involving Kenneth appears to constitute a classic bullying situation both under the state anti-bullying statutes and the School Board’s own policy which includes in this case an ongoing pattern of verbal abuse, as well as some limited evidence of physical abuse, on school grounds or on school vehicles. The officials of the School District attempt to characterize the offending behavior as “sixth grade boys being sixth grade boys”, and an opportunity for educating the students as to proper behavior. A review of all of the evidence demonstrates that there is much more going on. It is a classic case of one boy picking on another child, in whom he apparently sees some weakness. Kenneth has a birth defect, a learning disability resulting in reading deficits, and he receives special education. This was part of the verbal abuse directed at Kenneth. From the school’s standpoint, after notification of the pattern of behavior, they have to their credit attempted to tighten discipline in the sixth grade class to avoid these situations, but if Kenneth is to be believed, and there is no reason not to, the verbal activity continues. The school officials are clearly not physically capable of nor expected to monitor every moment of potential contact between these students during the school day. What goes on when no one is looking, at least according to Kenneth, is consistent with the previous behavior he initially reported

regarding Student B, name calling, insults, and threatening behavior as he related to his parents. To be fair, from the school officials' standpoint, Kenneth's behavior appears somewhat inconsistent regarding his contact with Student B who is supposedly bullying Kenneth. He often seeks him out, engages in conversation with him, and engages in play during recess with Student B. Some of this may be due to initial encouragement to try and get along with Student B, even though the School District has subsequently advised him to stay away from these types of situations. It is certainly possible that Kenneth may not be telling exactly the same stories to school officials and his parents, and might be exaggerating one and downplaying another version in an attempt to satisfy his listeners. Nonetheless, there is also undisputed medical evidence, behavioral evidence and academic results as to the ongoing problems encountered by Kenneth because of the continued stress imposed on him by the ongoing actions of another student. He has stomach pains, and is now being treated with medications to prevent an ulcer, he is grinding his teeth at night, he chews his fingernails to the point that they bleed, particularly on weekends before having to return to class, he expresses a desire not to go to school, he is being treated with a medication for his anxiety and depression after having seen a psychologist, and he has even expressed a desire to transfer to a new school district. His grades have demonstrably dropped during the later part of the school year. The School District may not have been able to determine from a strong evidential standpoint whether or not Student B was engaged in a pattern of "bullying". Nevertheless, Kenneth continued to be faced with a set of unique harmful conditions that not only had made the student's continued attendance in the District harmful, but would in all likelihood continue to do so in the future. The School District failed to look at the resultant effect upon the student being bullied, and instead focused on their limited observations of the two students and whether or not there was a clear pattern of bullying behavior. The failure to take



into consideration the harmful effects upon the student and the likelihood of continued harm to the student while in the District is, under these circumstances arbitrary, unreasonable and capricious. Kenneth's continued exposure to the name calling, insults and the subsequent fear generated by the ongoing behavior of Student B, is not a tolerable situation and there is no indication that this behavior would not continue to adversely affect him in seventh grade. This is a "unique set of harmful circumstances", for the purpose of the late filed option enrollment application under the Board's policy, faced by Kenneth and recognized as such by his parents. While the parents clearly see this, the school district does not. The Respondent School District's refusal to grant approval of the late filed request should be overturned by the Board.

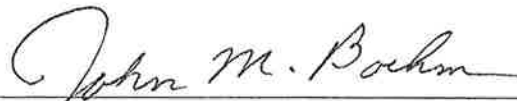
16. The application for Mariah is based entirely on the release criteria which provides that a release will be granted where the late filed application would allow the student to attend the same school as a sibling. The definition of sibling for this purpose means a child who resides in the same household with the student who is currently enrolled in the option district. Even with the overturning of the Board's decision regarding Kenneth, Kenneth is not enrolled in the option district because he has not yet been approved by the option district. While there are some timing issues involved, the intent of the applications at the time they were filed was clear, although there is some question as to whether the second application should have been submitted after Kenneth was approved in the option district. Had everything originally proceeded pursuant to those understandings, the Petitioners would not now be faced with the situation involving the difficulty of Kenneth's sister's application being approved. The Hearing Officer finds that in order to correct this situation, the denial of her application should also be overturned by the State Board. The ultimate approval of these two applications still remains subject to approval by the option enrollment district as required by law.

### RECOMMENDATION

The following is recommended by the Hearing Officer:

1. That the Respondent School District's decision to deny the Petitioners' option enrollment application for Kenneth be overturned and that the application be approved.
2. That the Respondent School District's decision to deny the Petitioners' option enrollment application for Mariah, likewise be overturned and that the application be approved.
3. That the State Board of Education, as part of its order, adopt the Hearing Officer's Findings of Fact and Conclusions of Law in all respects, and that such be made part of its order by reference to the same extent and like effect as if such Findings of Fact and Conclusions of Law were fully set forth verbatim in its order.

Dated this 1<sup>st</sup> day of December, 2010.



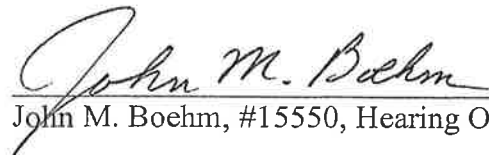
John M. Boehm, #15550  
841 South 13<sup>th</sup> Street  
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Hearing Officer

### CERTIFICATE OF SERVICE

The undersigned, John M. Boehm, hereby certifies that the original of the foregoing with attached transcript was hand delivered to Margaret D. Worth, General Counsel, Nebraska Department of Education, 301 Centennial Mall South, P O Box 94933, Lincoln, NE 68509, Nebraska on December 1, 2010, and a true and correct copy of the foregoing was served by First Class United States Mail, postage prepaid, on December 1, 2010, to the following parties:

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John M. Boehm, #15550, Hearing Officer